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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF SAN DIEGO, Plaintiff and Appellant, v. TRACY L. MEANS, Defendant and Respondent.	D051840 (Super. Ct. No. GIC858344)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed in part; reversed in part.

City of San Diego (the City) appeals a summary judgment in favor of Tracy L. Means, a former deputy director who managed the City's two airports, on its complaint against her for violating the City's rules and regulations pertaining to competitive bidding and the letting of contracts for consultant services. We reverse the judgment insofar as it concerns the two causes of action under California's False Claims Act (FCA) (Gov. Code, § 12650 et seq.), as there are triable issues of material fact concerning whether Means "knowingly" presented false claims to the City within the meaning of the FCA.

In all other respects we affirm the judgment. As a matter of law, Means is immune under Government Code section 822.2 from liability for common law misrepresentation, and California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and section 108 of the City's Charter are inapplicable.

FACTUAL AND PROCEDURAL BACKGROUND

To put the facts in context, we briefly discuss City of San Diego Administrative Regulation (Administrative Regulation) 25.70 and other relevant rules. The city manager may approve consultant contracts of between $25,000 and $250,000. (Admin. Reg. 25.70, §§ 4.1, 6.1).) Department directors may approve contracts to a single consultant totaling up to $25,000 in a 12-month period, but a department director may not authorize a lower level employee such as a deputy director to approve such contracts unless the city manager agrees in writing. (Admin. Reg. 25.70, § 5.2; City of San Diego Memorandum dated Nov. 18, 1997, clarifying Admin. Reg. 25.70, § 5.2.)

The City requires the competitive bidding of contracts except in limited circumstances. The City must advertise for services in excess of $50,000, and obtain at least three bids for services up to $50,000. (Admin. Reg. 25.70, § 6.5.)

The competitive bidding process does not apply if the city manager certifies in writing that the contract services are only available from a sole source and approves a sole source contract. (San Diego Mun. Code, § 22.3212(e); Admin. Reg. 25.70, § 9.3.) To justify a sole source contract, a department of the City must determine the "services are available from only one source and there is no permissible substitute. Justification for this determination must document the efforts made to identify and/or include alternatives,

actual identification and other possible sources, and reason for their exclusion." (Admin. Reg. 25.70, § 9.1.) The justification may be based on time constraints, cost savings or the consultant's unique expertise. (*Ibid.*)

In April 1997, after a national search, the City hired Means as a deputy director to manage the City's airports, Montgomery Field and Brown Field. She has a bachelor of science degree in professional aeronautics and a master's degree in aeronautical science.

Between September 2000 and June 2005, Means exceeded her authority by approving 13 purchase requisitions for a single consulting company based in Georgia, Airport Business Solutions (ABS), for services related to the operations, management and profitability of the two airports. The purchase requisitions totaled $308,000, but individually they were for between $20,000 and $25,000. On several occasions, Means approved two purchase requisitions on the same day for the same amount, divided between Montgomery Field and Brown Field. Based on the purchase requisitions, the City's purchasing division issued purchase orders for ABS's services.

Further, Means characterized the first ABS contract as a sole source contract without following proper procedures. She wrote a memorandum to Linda Baldwin, who was then the City's purchasing agent, which was ostensibly from William Griffith, who was Means's superior and the director of her department, requesting the contract based on time constraints and ABS's unique qualification as a "proven leader in [the] field." Means signed her name over Griffith's typed name. Griffith knew nothing about the memorandum.

In the fall of 2005 the City began an investigation into Means's conduct. She advised the fact-finding panel she made all of the purchase requisitions for ABS's services for $25,000 or less because she believed that was the limit of her contracting authority. She admitted she did not let the contracts out for competitive bidding.

The fact-finding panel found no evidence the city manager authorized Griffith or any other department director to delegate the authority to Means to enter into contracts for $25,000 or less. It found Means violated the City's regulations by approving the ABS purchase requisitions without authority, subdividing the services "into multiple, smaller increments . . . to keep the purchase orders within her *perceived authority* of up to $25,000," and not conducting competitive bidding. (Italics added.)

In November 2005 the City terminated Means's employment, and the following month the City sued her. The City filed several amended complaints, and in May 2007 it filed a fifth version (hereafter complaint), which as relevant here included causes of action for intentional misrepresentation (first), negligent misrepresentation (second), fraudulent concealment (eleventh), violation of the UCL (fifth), violation of the FCA (sixth and seventh), and liability under section 108 of the City's Charter (twelfth), which pertains to an officer's approval or demand for any payment not authorized by law. The complaint variously prayed for actual damages, prejudgment interest, treble damages, punitive damages, restitution and civil penalties.[1]

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1 The City purported to also sue on behalf of the State of California on the cause of action for violation of the UCL, but the State was not included in the notice of appeal.

Means moved for summary judgment, or in the alternative summary adjudication, arguing she is immune from liability on the misrepresentation causes of action under Government Code section 822.2, which protects a public employee from deceit-based claims unless he or she is motivated by actual malice or corruption; the UCL is inapplicable because she was acting within the course and scope of her employment and her conduct was not a business practice; the false claims causes of action lack merit because she did not knowingly present any false claims; and section 108 of the City's Charter is inapplicable because she is not an officer of the City.

The court granted Means's motion on all causes of action and entered judgment for her on September 20, 2007.

DISCUSSION

I

Standard of Review

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant satisfies this burden by showing " 'one or more elements of' the 'cause of action' . . . 'cannot be established,' or that 'there is a complete defense' " to that cause of action. (*Ibid.*) Likewise, "to establish entitlement to summary adjudication of a cause of action, the moving party defendant must establish that the cause of action is without merit by

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The complaint also named ABS and its principals as defendants, but they are not

negating an essential element or by establishing a complete defense." (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1726-1727.)

" 'Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 849.) But "if the showing by the defendant does not support judgment in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534.)

"The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true. [Citation.] Nor may the trial court grant summary judgment based on the court's evaluation of credibility. [Citation.] Nor may the trial court grant summary judgment for a defendant based simply on its opinion that plaintiff's claims are 'implausible,' if a reasonable fact finder could find for plaintiff on the evidence presented." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.) "The court must consider not only the bare evidence, but also reasonable inferences deducible from the evidence." (*Ibid.*)

We independently review the ruling on a motion for summary judgment or summary adjudication. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

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involved in this appeal.

II

Misrepresentation Claims/Immunity
(First, Second and Eleventh Causes of Action)

A

Government Code section 822.2 provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." Immunity under Government Code section 822.2 is not absolute. Rather, "it applies only when the negligent or intentional wrongdoing involves interferences with financial or commercial interests." (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 738, fn. 8.)[2]

"The courts have assumed that the immunity includes all types of fraud and deceit cases including fraudulent concealment." (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 867-868.) The essential elements of a common law deceit action are a misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage. (*Curcini v. County of Alameda* (2008) 164

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2 Government Code section 818.8, a counterpart to section 822.2, grants public agencies absolute immunity for the misrepresentations of their employees. (*Harshbarger v. City of Colton* (1988) 197 Cal.App.3d 1335, 1340.) The legislative history of sections 818.8 and 822.2 shows they were intended "to provide a public entity and its employees 'with protection against possible tort liability where it is claimed that an employee negligently misrepresented that the public entity would waive the terms of a construction contract requiring approval before changes were made.' " (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 903.) Ordinarily, the employee immunity is raised in a lawsuit brought by a third party, rather than, as here, the public employer.

Cal.App.4th 629, 649; Civ. Code, §§ 1572, 1710.)

The "immunity afforded by Government Code section 822.2 applies unless, *in addition to the essentials of common law deceit*, a public employee is *motivated by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business*." (*Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 410, italics added, disapproved of on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744; *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 42.) Conclusory allegations are insufficient. The plaintiff must establish "*facts* showing the fraud was motivated by corruption or actual malice" within the meaning of Government Code section 822.2. (*Curcini v. County of Alameda, supra,* 164 Cal.App.4th 629, 649.)

In *Schonfeld v. City of Vallejo, supra,* 50 Cal.App.3d 401, 409, the court rejected the notion the definition of "actual fraud" found in Civil Code section 1572, or the definition of "deceit" in Civil Code section 1710, applies to the term "actual fraud" as used in Government Code section 822.2.[3] Rather, the court agreed that for purposes of

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[3] Civil Code section 1709 embodies the common law of fraud. It provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers." Civil Code section 1710 sets forth the elements of actionable fraud. It provides: "A deceit, within the meaning of the last section, is either: 1. The suggestion, as a fact, or that which is not true, by one who does not believe it to be true; [¶] 2. The assertion, as a fact, or that which is not true, by one who has no reasonable ground for believing it to be true; [¶] 3. The suppression of a fact, by one who is bound to disclose it, or who gives information or other facts which are likely to mislead for want of communication of that fact; or, [¶] 4. A promise, made without any intention of performing it." Civil Code section 1572 pertains to "[a]ctual

the immunity the term "actual fraud" "must be construed to mean 'fraud and malice' based on *personal malevolence or wrongful purpose* [citation] and that 'actual malice' is akin to that required for defamation, malicious prosecution or exemplary damages." (*Schonfeld v. City of Vallejo supra,* at p. 409.)

In *Masters v. San Bernardino County Employees Retirement Assn., supra,* 32 Cal.App.4th at page 42, the court explained: "If we were to interpret the term 'actual fraud' in Government Code section 822.2 as coextensive with the meaning of 'actual fraud' in Civil Code section 1572 or the parallel definitions of 'deceit' in Civil Code section 1710, '. . . Government Code section 822.2 would be unintelligible. Inasmuch as both intentional and negligent misrepresentations are encompassed within the definition of "actual fraud" pursuant to Civil Code sections 1710, subdivisions 1 and 2 and 1572, subdivisions 1 and 2, the statute would read, in essence: "A public employee is not liable for his intentional or negligent misrepresentation unless he is guilty of intentional or negligent misrepresentation." Such an interpretation would render the entire statute meaningless and the legislative purpose would clearly be defeated.' "

B

1

The City contends Means failed to meet her burden of persuasion and thus the burden never shifted to the City to raise a triable issue of material fact. The City,

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fraud" in the context of a contractual relationship and parallels the provisions of Civil Code section 1710.

however, misunderstands what Means was required to show to meet her burden on the immunity issue.

The pleadings delineate the issues on summary judgment. (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 236.) The complaint's cause of action for intentional misrepresentation alleged that by signing and submitting the sole source memorandum for ABS's services to the City's purchasing division, Means intentionally misrepresented that the approval came from her supervisor, Griffith, and that ABS qualified as a sole source provider. The misrepresentations allegedly caused the purchasing division to issue all of the purchase orders to ABS and the circumvention of competitive bidding, which Means knew was required by Administrative Regulation 25.70 and other rules. The cause of action for negligent misrepresentation essentially repeated the allegations of the intentional misrepresentation cause of action. The cause of action for fraudulent concealment alleged Means knew the business plans ABS prepared for the airports were substandard or incomplete, but did not advise the City, and had the City known it would not have paid ABS.

Within the body of these causes of action, the complaint alleged no *facts* to show Means's conduct, even if knowingly wrongful, was *motivated* by *actual malice* or *corruption* within the meaning of Government Code section 822.2. Rather, the causes of action alleged in conclusory fashion that Means's conduct was intended to vex, annoy or harm the City.

Introductory paragraphs incorporated into the misrepresentation causes of action, however, alleged that Means and ABS principals Michael Hodges and Roberta

Thompson knew the consultant services were required to be let for competitive bidding, and they colluded to artificially divide the services to avoid competitive bidding and bring the contracts within Means's perceived approval authority. The City apparently intended that those alleged facts, if proven, would show Means acted with actual malice and corruption within the meaning of Government Code section 822.2. Indeed, on appeal the City emphasizes a purported personal relationship between Means and Thompson.

Means submitted a declaration, which states: "I have never had any type of special or close relationship with either . . . Thompson or . . . Hodges. They are simply professional colleagues who I have come to know because we work in the same industry." Further, Means's declaration states, "I did not benefit in any way, i.e. not personally, financially or professionally, from the work that ABS did for the City. It was simply part of my job, from time to time, to identify people to be hired by the City to get work done."

Means also submitted declarations by Hodges and Thompson, which both state, "I do not have any special relationship with [Means] and am not good friends with her. Rather, I see us as professional colleagues." Moreover, Means submitted Hodges's and Thompson's responses to the City's requests for admissions, in which they both denied Means derived any personal financial benefit from doing business with ABS. They also denied colluding with Means to "divide up the business plan projects" for the two airports into increments under $25,000, or to circumvent the City's competitive bidding process.

Additionally, Means submitted evidence that she received strong evaluations during her tenure with the City. In several evaluations her superior, Griffith, gave her

"Superior," "Exceptional" and "Fully Competent" ratings on a variety of factors. He closed one evaluation with, "We are lucky to have [Means] at the helm." Another evaluation states Means "[c]onsistently looks out for the best interests of the City and citizens; puts the City's interests above personal . . . interests." Another evaluation explains Means had obtained more of a type of grant "than any other Airports director in the departments' [*sic*] history," and "[t]his has had a tremendous impact on the financial stability of the enterprise fund and is taking the airports physical improvements to a much higher standard."

We conclude the evidence was sufficient to satisfy Means's burden of showing she was not "*motivated* by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business." (*Schonfeld v. City of Vallejo, supra,* 50 Cal.App.3d at p. 410.) Contrary to the City's position, the court did not misapply the parties' burdens on summary judgment. The court's minutes carefully explain the court's reasoning, and they state, "[Means] having met her burden, the burden then shifted to [the City] to try and create a triable issue of fact."

The City complains that Means's evidence is "totally irrelevant to the *prima facie* case of misrepresentation." Means, however, was not required to negate the elements of common law fraud. Rather, since the City could not prevail unless it proved she was motivated by actual malice or corruption within the meaning of Government Code section 822.2 *in addition* to the elements of common law fraud, she could satisfy her burden of persuasion by showing she was *not* so motivated. The City concentrates on Means's showing as to her knowledge of wrongdoing, but that is not the point. It is, of

course, possible for a public employee to intentionally violate his or her employer's policies and lie about it or conceal the truth without having the personal malevolence required to override the general rule of immunity. Contrary to the City's position, Means was not required to expressly state in a declaration that she "did not have a conscious intent to deceive." (Capitalization omitted.) Rather, she could adduce evidence that raises an inference she did not act with actual malice or corruption.

2

Alternatively, the City contends it met its burden of raising triable issues of material fact. The City asserts the court ignored its evidence of a personal relationship between Means and ABS principal Thompson, and the relationship considered in conjunction with Means's conduct meets the actual malice or corruption exception to immunity under Government Code section 822.2.

The City produced hearsay evidence in a declaration to which Means successfully objected. The City also cited pages 81 and 82 of the transcript of the deposition of Alan Fink, the chairman of the City's airport advisory committee. Page 81 begins with the following partial response by Fink to an unknown question: ". . . whenever he [unknown person] tried to talk to [Means] about anything, she didn't want to hear it. She just said, 'Go talk to [Thompson]; I'm not going to deal with it.' That's where I found out originally that there was a pre-existing friendship between the two." Means's counsel asked Fink, "When you say you learned that [Means] and [Thompson] had a pre-existing relationship, what do you mean by pre-existing relationship?" Fink responded, "That they were friends and they worked together on a regular basis."

In her reply separate statement, Means objected to Fink's testimony on the ground of hearsay. The City asserts Means has waived appellate review of the admissibility of the evidence because she neither filed her objection in a separate document, as required by California Rule of Court, rule 3.1352, nor obtained a ruling from the court on it. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 713.) When the trial court does not rule on an objection, we consider the evidence in evaluating whether the offering party met its burden on summary judgment. (*LLP Mortgage, Ltd. v. Bizar* (2005) 126 Cal.App.4th 773, 776-777.)

Fink's meager testimony, however, raises no triable issue of material fact. It is undisputed that Means and Thompson worked together for several years on ABS's contracts with the City, and Fink did not state he had learned of any relationship between them that predated the first contract with ABS. Further, the term "friends" is vague, particularly in the context of a working relationship. Many persons who work together develop a friendly relationship, but in and of itself that does not show Means had any bias, favoritism or ill-will toward the City. Fink did not, for instance, testify as to any social relationship between Means and Thompson, or even that they were rumored to have had lunch together during work hours. The City filed many declarations by its employees in an effort to defeat Means's summary judgment motion, including a declaration by Fink, and not one of them hints of any personal relationship between Means and Thompson or Hodges.

Additionally, Means's evidence that she gained no personal financial or professional benefit from doing business with ABS is undisputed. The City asserts the

trial court "neglected to consider . . . the circumstantial evidence of non-monetary benefits." In its separate statement, the City referred the court to its answer to Means's special interrogatory No. 79, in which the City admitted it had no evidence that Means received "tangible benefits such as monetary, gifts or other remuneration." As to intangible benefits, the City speculated in its separate statement that Means "needed to be in control and to appear as if she knew exactly what she was doing at all times," she "did not always have answers and/or solutions to issues, problem[s] and questions as they confronted her," and . . . "Hodges and . . . Thompson acted as a personal crutch to . . . Means in providing her with information that assisted [her] personally in portraying a level of competence that she did not possess." The City also surmised that with Hodges's and Thompson's assistance Means "was able to keep her job . . . and to obtain performance ratings higher than perhaps she was entitled to." The City, however, cited no evidence to support those claims. Further, we do not see how the claims show any actual malice or corruption within the meaning of Government Code section 822.2.

The City also points to evidence it submitted to dispute statements in Means's declaration intended to raise an inference she was unaware her conduct was wrongful. For instance, the declaration stated she never received any formal training regarding the City's procedures, rules or regulations, and she obtained all her knowledge from performing her job duties and learning from her superiors and other employees. The declaration also stated, "In making the various expenditures I did, including those related to ABS, I followed the rules I was taught and the directions of my superiors. I was never

told that I was doing anything wrong regarding the hiring or use of consultants or, for that matter, any vendors."

The City produced evidence, for instance, that Means conceded she was aware of Administrative Regulation 25.70, and she had undergone training on the correct methods of processing purchase requisitions. Again, however, Means's knowledge of wrongdoing is an element of a common law fraud count and raises no triable issue pertaining to her motivation.

The City adduced no evidence suggesting Means's conduct fell within the exception to the general rule of public employee immunity for deceit. Without any evidence of, for instance, a special relationship between Means and Thompson or Hodges, bribery, kickbacks, some quid pro quo or ill-will toward the City, the City's theory of actual malice or corruption does not hold water.

Moreover, contrary to the City's suggestion, a mere "failure to disclose" or "intent to mislead" does not satisfy the "corruption" element of Government Code, section 822.2. The term "corruption" means "impairment of integrity, virtue or moral principle," or "inducement . . . by means of improper considerations (as bribery) to commit a violation of duty." (Webster's 3d New Internat. Dict. (1993) p. 512.)

Summary adjudication is appropriate on the first, second and eleventh causes of

action because Government Code section 822.2 provides a complete defense.[4]

III

UCL

(Fifth Cause of Action)

The City challenges the trial court's findings that to the extent the predicate acts for the UCL claim are based on misrepresentation, the claim is barred by Government Code section 822.2 immunity, and a public employee acting within the course and scope of her employment with a public agency has no liability under the UCL.

The UCL does not proscribe specific acts, but broadly prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) The UCL "governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' [Citations.] By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as

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4 In its ruling on the misrepresentation causes of action, the trial court relied in part on Means's showing that she was unaware her conduct was wrongful, and the City's failure to raise any triable issue of fact on the matter. The minutes state, "At best, . . . the evidence reflects that [Means] did not follow certain policies and/or procedures and perhaps was negligent in that regard." As discussed, the knowledge issue is not dispositive. The court also relied, however, on the lack of any evidence that Means had a special relationship with Hodges or Thompson or that Means received any personal or financial benefit from the ABS contracts. " 'As a corollary of the de novo review standard, the appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court. [Citation.]' " (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)

unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

The UCL applies to "persons," which does not include governmental entities. (Bus. & Prof. Code, § 17201; *Janis v. California State Lottery Commission* (1998) 68 Cal.App.4th 824, 831.) Accordingly, a UCL cause of action against a public agency fails as a matter of law. (*Janis, supra*, at p. 831; *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1202.) Because public agencies may be liable for their employees' conduct in the course and scope of employment, allowing a UCL cause of action against employees would defeat the Legislature's intent not to expose public agencies to UCL claims. Here, a public agency is suing a former employee for damages, but most UCL cases are not brought in the employment context. Further, allowing a UCL cause of action based on misrepresentations would thwart the Legislature's intent to immunize public employees from fraud under Government Code section 822.2 with limited exceptions.

The City submits that Means was not acting within the course or scope of her employment, and rather her conduct was "*ultra vires*" because it violated the City's rules and regulations. The City cites no supporting legal authority. "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)

In any event, the City's position lacks merit. The issue of whether a public employee was acting within the scope of his or her employment ordinarily arises in the context of a claim against the employer under the doctrine of respondeat superior. " 'A risk arises out of the employment when "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." ' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. [Citations.] So may acts that do not benefit the employer [citation], or are willful or malicious in nature." (*Ibid.*) "If the object or end to be accomplished is within the employee's express or implied authority his [or her] act is deemed to be within the scope of his [or her] employment irrespective of its wrongful nature." (*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 875.) Means was performing work she was hired to perform pertaining to planning for the City's airports, albeit in an improper manner.

The City also asserts the issue is a factual one for trial. " 'Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when "the facts are undisputed and no conflicting inferences are possible." ' " (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299.) Here, the facts pertaining to the scope

and course of employment issue are undisputed, and accordingly summary adjudication on the UCL cause of action is proper.[5]

IV

False Claims Act
(Sixth and Seventh Causes of Action)

Further, the City contends summary judgment on its two causes of action under the FCA is improper because there are triable issues of fact pertaining to the element of scienter. We agree.

The FCA "was enacted in 1987 and is patterned largely on similar federal legislation [citation]. [Citation.] The [FCA] is designed to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties . . . to bring suit on behalf of the government. [Citation.] The ultimate purpose of the [FCA] is to protect the public fisc. [Citation.] To that end, the [FCA] must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies." (*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1676.)

Under the FCA, a governmental plaintiff may recover treble damages, plus costs, and civil penalties from any person who "[k]nowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim

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[5] Given our holding, we are not required to address Means's contention her conduct did not constitute a "business act or practice" under Business and Professions Code section 17200.

for payment or approval," or "[k]nowingly makes, uses, or causes to be made a false record or statement to get a false claim paid or approved by the state or by any political subdivision." (Gov. Code, § 12651, subd. (a)(1) & (2).) A "defendant need not be a recipient or beneficiary of the false claim to be liable under the [FCA]." (*County of Kern v. Sparks* (2007) 149 Cal.App.4th 11, 17.)

For purposes of the FCA, a "claim" includes "any request or demand for money . . . made to any employee, officer, or agent of the state or of any political subdivision." (Gov. Code, § 12650, subd. (b)(1).) The term "knowingly" means "that a person, with respect to information, does any of the following: (A) Has actual knowledge of the information. [¶] (B) Acts in deliberate ignorance of the truth or falsity of the information. [¶] (C) Acts in reckless disregard of the truth or falsity of the information." (Gov. Code, § 12650, subd. (b)(2).) Specific intent to defraud is not required. (Gov. Code, § 12650, subd. (b)(2)(C).) [6]

Given "the very close similarity of California's act to the federal act, it is appropriate to turn to federal cases for guidance in interpreting the [FCA]." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 802.) The federal act (31 U.S.C. § 3729 et seq.) " 'is intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' [Citation.] Its reach extends to 'any person

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6 Government Code section 822.2 does not, of course, immunize a public employee from a violation of the FCA. (See *County of Kern v. Sparks, supra,* 149 Cal.App.4th 11, 17-20.)

who knowingly assisted in causing the government to pay claims which were grounded in fraud.' " (*City of Pomona v. Superior Court, supra,* at p. 802.)

"Liability under the federal act attaches 'when a contract was originally obtained based on false information or fraudulent pricing.' [Citations.] In other words, the claim itself need not be false but only need be underpinned by fraud." (*City of Pomona v. Superior Court, supra,* 89 Cal.App.4th at p. 802.) A " 'fraudulently induced contract may create liability under the [federal act] when that contract later results in payment thereunder by the government, whether to the wrongdoer or someone else.' " (*Id.* at p. 803.)

The FCA causes of action, which incorporate all previous allegations of the complaint, allege ABS's invoices were false claims and false records and Means knowingly presented them to the City for payment. The claims were allegedly false because they were based on illegal contracts Means induced the City to enter by signing and submitting the sole source memorandum with Griffith's name on it without his authority, when ABS did not qualify as a sole source contractor, and by splitting the contracts into amounts of $25,000 or less to justify not obtaining authorization for the contracts or letting them out for competitive bidding. The invoices were also allegedly false claims because ABS did not perform the work contracted for or performed work outside the scope of the contracts, and ABS billed at higher hourly rates than those agreed on and inflated work hours.

Means's summary judgment motion was based on the ground she did not "knowingly" present any false claim. For purposes of summary judgment she "did not

argue about whether the [City] could prove that she had engaged in presenting, making or using a false claim."

Means relies on evidence she adduced that Griffith gave her "stellar" employment evaluations and never criticized her for misusing any of the City's rules or regulations, ABS was on an approved list of vendors and she treated it like any other vendor, no one ever told her she was doing anything wrong in selecting vendors, including consultants, she received no formal training on the City's rules and regulations, and she relied on the City's "Purchasing, Auditor and Comptroller, Treasurer and Personnel departments" "to let me know if there were any problems."

None of that evidence, however, showed Means did not "knowingly" submit false claims within the meaning of the FCA. The evidence raised no inference Means lacked actual knowledge the ABS invoices were false claims because she wrongfully induced the City to enter into unauthorized and illegal contracts with ABS, or that she did not act "in deliberate ignorance of the truth of falsity of the information," or did not act "in reckless disregard of the truth or falsity" of the invoices. (Gov. Code, § 12650, subd. (b)(2).) Notably, Means's declaration does not disavow knowledge of falsity.

As Means did not meet her burden of persuasion, the burden did not shift to the City to present triable issues of fact pertaining to her knowledge. The City, however, did raise triable issues.

For instance, the City submitted the declarations of Daro Quiring and Tammy Rimes, two of the three City employees who were on the fact-finding panel that investigated Means's conduct. Quiring's declaration stated he participated in an interview

with Means on October 21, 2005, and she "stated that the ABS Business Plan projects and other projects performed by ABS for the City's two airports were not combined because she was only authorized to spend less than $25,000. . . . Means also stated that she had to separate the projects per airport as she thought she could only authorize up to $25,000." The declaration also stated that during the interview, "Means admitted that a competitive selection process was not conducted in connection with the hiring of ABS for the 14 purchase order contracts."[7] The Quiring declaration also stated that in a follow-up interview of Means on October 24, 2005, Means "admitted that she had read or referred to [Administrative Regulation] 25.70."

Rimes's declaration states she also attended the same two interviews and heard Means make the same statements. The declaration also states that as a result of the August 15, 2000 sole source memorandum that Means wrote and signed, the City issued the first purchase order to ABS. Further, contrary to Means's declaration, the declaration states the City had no approved list of consultants.

Additionally, the City submitted a declaration by Baldwin, the City's purchasing agent at the relevant time, which stated that on September 29, 1999, she sent a memorandum to Means regarding a request Means made for a sole source contract for a consultant other than ABS. Baldwin rejected the request as it did not meet the requirements of Administrative Regulation 25.70. Baldwin referred Means to the regulation and included a copy of it. Baldwin's memorandum advised Means that if the

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[7] Again, the complaint alleges there were 13 purchase orders for ABS.

provisions of the regulation pertaining to sole source contracts were applicable, she should submit her request and supporting documentation to the department director or the city manager for approval.

The City also submitted a declaration by David Bond, who was a project manager for San Diego Data Processing Corporation, a corporation the City owns, and managed the City's "Online Purchasing Information System" (OPIS). The declaration stated "OPIS is a computerized purchase requisition software system that generates the City's purchase orders for the procurement of goods and services, including consultant services," and the first step in the OPIS system is a department's preparation of a purchase requisition. The declaration explained that Bond conducted training programs for OPIS and Means attended one of his sessions in late 1999, before she began approving the purchase requisitions for ABS. Further, the declaration stated that in "approving a purchase requisition under $25,000 for a consultant, . . . Means was authorizing the issuance of a purchase order. . . . Means was also representing to Purchasing that the proper authorization for the hiring of the consultant had been obtained and the required competitive selection process had been performed. All of this information was imparted to . . . Means during her OPIS training session in 1999."

Further, the City presented evidence to refute the statements in the declarations of Hodges and Thompson, the ABS principals, that the "hourly rates used on invoices to the City for work [ABS] did were consistent with our agreements with the City." The City submitted documents that showed Hodges and Thompson agreed to hourly rates of $185 and $140, respectively, for the development of business plans for the airports and related

tasks[8], but Means approved invoices for payment in which Thompson charged between $145 and $165 per hour , and Hodges charged between $195 and $210 per hour.

Means makes light of the City's evidence and disputes it, but the evidence raises triable facts as to whether Means "knowingly" presented false claims within the meaning of the FCA. A jury could reasonably infer Means knew of the City's rules and regulations pertaining to hiring consultants and competitive bidding, and that she intended to deceive the City by authoring and signing the sole source memorandum with Griffith's name on it, splitting the ABS work into amounts not exceeding $25,000, and approving a series of purchase requisitions for ABS. Perhaps Means did lack the requisite scienter, but this record does not establish that as a matter of law. " ' "Any doubts about the propriety of summary judgment . . . are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors.' [Citation.]' " (*Long v. Walt Disney Co.* (2004) 116 Cal.App.4th 868, 871.)

V

City Charter Section 108
(Twelfth Cause of Action)

Section 108 of the City Charter provides: "Every officer who shall willfully approve, allow, or pay any demand on the treasury not authorized by law, shall be liable to the City *individually and on his official bond*, for the amount of the demand so

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8 The City's agreements with ABS stated a specific amount that was not to be exceeded, such as $24,500, but ABS charged the City hourly rates.

approved, allowed or paid, and shall forfeit such office and be forever debarred and disqualified from holding any position in the service of the City." (Italics added.)

The City concedes that Means was not a bonded employee. It contends summary judgment on this cause of action was improper, however, because a City employee need not be bonded to be an "officer" within the meaning of section 108 and Means did not show she was not an officer. The City asserts there is "a disputed issue of material fact requiring an analysis of [Means's] job duties and responsibilities and the definition."

We are not required to address the issue of interpretation, because the trial court properly disposed of the cause of action on the ground Means was not an officer of the City. Means submitted a declaration by George Loveland, who worked for the City for 38 years and at the time of his retirement in 2005 was the assistant city manager. The declaration stated: "Based on my experience with the City, and my progression through the ranks to my ultimate position of Assistant City Manager, the officers of the City of San Diego were those appointed by the Mayor and Council: the City Manager, the Auditor and Comptroller, and the City Clerk. Deputy Directors are not 'officers' of the City." The City produced no contradictory declaration, and thus summary adjudication on this claim is proper.

DISPOSITION

We affirm the judgment insofar as it concerns the complaint's first, second, fifth, eleventh and twelfth causes of action, as summary adjudication is proper on them. We

reverse the judgment insofar as it concerns the sixth and seventh causes of action as there are triable issues of fact pertaining to whether Means knowingly presented false claims to the City. The parties are to bear their own costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.